

FEB 3 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

ORIGINAL

In the Matter of)

Biennial Regulatory Review -- Amendment of
 Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97
 and 101 of the Commission's Rules to
 Facilitate the Development and Use of the
 Universal Licensing System in the
 Wireless Telecommunications Services)

WT Docket No. 98-20

Amendment of the Amateur Service Rules to
 Authorize Visiting Foreign Amateur Operators to
 Operate Stations in the United States)

WT Docket No. 96-188

RM-8677

To: The Commission

SUPPLEMENT TO PETITION FOR PARTIAL RECONSIDERATION

The American Radio Relay League, Incorporated (the League), the national, non-profit association of licensed amateur radio operators in the United States, by counsel and pursuant to §1.429 of the Commission's rules (47 C.F.R. §1.429), hereby respectfully submits this Supplement to its previously filed Petition For Partial Reconsideration of the Commission's *Report and Order*, FCC 98-234, released October 21, 1998, (63 Fed. Reg. 68904, published December 14, 1998) in the above-captioned proceeding. The League's Petition For Partial Reconsideration, which addressed certain aspects of the *Report and Order*, was filed on or about January 13, 1999. Since that time, an additional, and apparently unintentional, error has been noted in the Appendix to the *Report and Order*, necessitating this Supplement to the League's Petition For Partial Reconsideration. In support whereof, the League states as follows:

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I. Introduction

1. On February 19, 1998, the Commission adopted a Notice of Proposed Rule Making (hereinafter *ULS NPRM*) proposing the implementation of the Universal Licensing System (ULS) for most wireless services.¹ The League filed Comments in the proceeding, raising specific implementation issues.² On October 21, 1998, the Commission released the above-captioned *R&O*. While the *R&O* addressed many of the concerns raised in the League's Comments, it did not adequately address some important issues, including the continuing need for the issuance of FCC paper licenses and the effect of the requirement of Taxpayer Identification Numbers (TIN) on non-United States citizens. Accordingly, on or about January 13, 1999, the League filed a Petition For Partial Reconsideration, which addressed these and other aspects of the *R&O*. Thereafter, the League noticed an additional, although apparently unintentional, error in that the Commission's revised rules -- set forth in Appendix G of the *R&O* -- omitted §97.15(e) of the Commission's Amateur Service rules. This rule change is already reflected in the Federal Register publication of the *R&O*, and, to date, no erratum has been issued to correct the error.

II. The Commission erred in omitting subsection (e) of §97.15 from its "Final Rules" provided in Appendix G of the *R&O*.

2. While the Commission proposed changes to §97.15 in the *ULS NPRM*, it neither proposed nor discussed the elimination of subsection (e) thereof, which states as follows:

¹ Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Notice of Proposed Rule Making*, 13 FCC Rcd 9672 (1998) (*ULS NPRM*).

² See, the *Comments of the American Radio Relay League, Incorporated in Response to Notice*

§97.15 Station antenna structures.

“(e) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority’s legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.]”

In fact, the Commission’s previously stated proposal in the *ULS NPRM* was to revise only subsections (a), (b) and (d)³. Nevertheless, the *R&O* in Appendix G “Final Rules” states that §97.15 is revised to read as follows:

§97.15 Station antenna structures.

Owners of certain antenna structures more than 60.96 meters (200 feet) above ground level at the site or located near or at a public use airport must notify the Federal Aviation Administration and register with the Commission as required by Part 17 of this chapter.”

The Federal Register reflects this change. Thus, the Commission has deleted subsection (e) from its rules, despite the fact that such deletion has no foundation in any proposal in the *ULS NPRM*, nor in any discussion in the *R&O*. Subsection (e) is qualitatively different from the remainder of §97.15, which deals with air safety issues. Subsection (e) codifies the Commission’s policy on preemption of state and local land use regulation of amateur radio antennas. The elimination of §97.15(e) is improper procedurally because the Commission never issued an NPRM proposing such a change, and never provided the opportunity for comments on such a substantial rule

of Proposed Rule Making, filed May 21, 1998.

³ Paragraph 160 of Appendix K of the *ULS NPRM* proposes to revise only (a), (b) and (d) of §97.15. There was never any discussion in the *ULS NPRM* of eliminating §97.15(e), or modification of that subsection whatsoever. Instead, the *ULS NPRM* specifically proposed to leave that subsection intact.

change.⁴ Nor could the deletion of the rule subsection be deemed to follow from any proposal in the *ULS NPRM*, and no comment filed in the proceeding made reference to §97.15(e) whatsoever.

3. The elimination of §97.15(e) represents a substantial regulatory change which, having been done without prior notice, would constitute a violation of the Administrative Procedure Act.⁵ It would appear, however, that the Commission's omission of subsection (e) was simply an oversight. Nevertheless, if not immediately corrected, the deletion will have serious repercussions for many licensed amateur radio operators. Section 97.15(e), which codified the Commission's holding in Amateur Radio Preemption (commonly known as PRB-1), 101 FCC 2d 952 (1985), and thus differs substantially from the remainder of §97.15, has been the guardian of the rights of amateur operators to effectively communicate, unencumbered by unreasonable state and local land use regulations.

4. In the *MO&O* in PRB-1, the Commission recognized the important functions that amateur radio operators serve and held that "state and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted."⁶ Moreover, the Commission found that "because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications." Therefore, the Commission held that state or local regulations could not preclude amateur communications and that "local regulations which involve placement, screening, or height of antennas based on health, safety, or

⁴ The repeal of §97.15(e) violates the Administrative Procedure Act, 5 U.S.C. §553, because the Commission failed to provide notice of the rule change and failed to provide interested parties, such as Petitioner, an opportunity to submit comments and be heard on the issue.

⁵ See 5 U.S.C. §553.

⁶ ¶24 of PRB-1 MO&O, 101 FCC 2d 952 (1985).

aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." These findings were, and continue to be, critical in securing amateur operators' ability to function. Since the adoption of the *MO&O*, and due to its codification in §97.15(e), hundreds, if not thousands, of amateur operators have utilized, and continue to utilize, this succinct rule to educate local land use regulators, and to dissuade them from unfairly and unlawfully precluding or disaccommodating amateur antennas. The protections afforded by §97.15(e) remain as important today as they were when it was first adopted, if not more so. Now, if left uncorrected, the Commission's unexplained omission of subsection (e) in enacting revisions to the remainder of §97.15 threatens to undermine amateur operators' ability to fulfill their obligations as Commission licensees.

III. Conclusion

5. In sum, the elimination of §97.15(e) of the rules is not consistent with the Commission's proposals and discussions in its *ULS NPRM* and *R&O*. The deletion, which was unexplained and not subject to notice or public comment, will cause serious harm to amateur operators. Therefore, the foregoing considered, the League respectfully requests that the Commission immediately issue an erratum to the *R&O* to correct the deletion of subsection (e)⁷; or, in the alternative, reconsider and modify its *R&O* as indicated hereinabove.

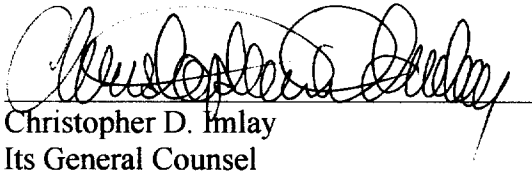
⁷ Radio amateurs typically obtain local land use permits for new or modified antenna installations in the Spring of each year. The deletion of this rule subsection will have immediate adverse consequences for many hundreds of radio amateurs if not corrected now.

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Respectfully submitted,

**THE AMERICAN RADIO RELAY LEAGUE,
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